Tribal Environmental Regulatory Authority

Inherent Authority and Authority under Federal Environmental Statutes

Background

- Historical Issues involving Native American Sovereignty and Definitions
- Definitions
  - Indian country
  - Formal reservation
  - Disestablishment or diminishment
  - Inherent tribal sovereignty
  - Plenary power of Congress
  - Indian Commerce Clause of Constitution
  - Federal trust doctrine

Federal trust doctrine

- Originated in Cherokee Nation v. Georgia and Worcester v. Georgia
- Chief Justice Marshall opinions
- In *Cherokee Nation*, Chief Justice John C. Marshall called the Cherokee Nation a "domestic dependent nation" that must look to the federal government for protection. In *Worcester*, Marshall held that Cherokee treaties ceded tribal lands to the United States in return for permission for the tribes to live as a separate community. According to Chief Justice Marshall, the United States agreed to protect tribal entities and tribal territory. Further, Chief Justice Marshall indicated that the trust relationship between Native American tribes and the U.S. government obligated the federal government to address claims brought by either tribes or their corporate entities, and to protect tribal lands and resources. Chief Justice Marshall confirmed that tribal sovereignty was acknowledged and guaranteed by the U.S. government, thus forming the basis for Native American "trust" status.

Examples of Application of Federal Trust Doctrine

- The federal trust doctrine has been applied in various circumstances.
- For example, in *Worcester*, Chief Justice Marshall, in confirming the Native Americans' rights to the tribal lands, held that the Native American nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive ….“
- Later, in *Lane v. Pueblo of Santa Rosa*, the Court used a guardian-ward analogy to define the relationship between the tribe and the Secretary of the Interior. This guardian-ward relationship prevented the disposal of tribal land in a manner similar to disposal of other public land, with the *Santa Rosa* Court asserting "that … [such a disposal] would not be an exercise of guardianship, but an act of confiscation.“
- Then, in *Cramer v. United States*, the Supreme Court recognized a Native American's right of occupancy rooted in the "traditional American policy toward these dependent wards of the nation," to void a federal patent.
- Subsequently, the Supreme Court held the federal government liable for mismanagement of tribal land in *United States v. Creek Nation*.
- Additionally, the trust doctrine can be applied to an executive agency, such as EPA, which must fulfill its obligations under the doctrine.

The Mitchell Decisions

- Created the rule that the "general trust relationship between the United States and the Indian people" is insufficient to establish specific fiduciary duties. United States v. Navajo Nation, 537 U.S. 488, 506 (2003). Substantive statutes and regulations must expressly create a fiduciary relationship that gives rise to defined obligations, or their must be extensive government management control over Indian-owned resources. United States v. White Mountain Apache Tribe, 537 U.S. 465, 474 (2003).
- Compare Mitchell II, 463 U.S. at 224 (finding fiduciary relationship between government and Indian allottees where Secretary had "full responsibility to manage Indian resources and land for the benefit of the Indians with United States v. Mitchell (Mitchell I), 445 U.S. 535, 542 (1980) (finding no fiduciary duty to Indian allottees where "[t]he Act [in question] does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands").

EPA acknowledgment—1984 policy

- 1. The agency stands ready to work directly with Indian tribal governments on a one-to-one basis (the "government-to-government" relationship), rather than as subdivisions of other governments.
- 2. The agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with agency standards and regulations.
- 3. The agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands.
- 4. The agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs.
- 5. The agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments.
- 6. The agency will encourage cooperation between tribal, state and local governments to resolve environmental problems of mutual concern.
- 7. The agency will work with other federal agencies which have related responsibilities on Indian reservation to enlist their interest and support in cooperative efforts to help tribes assume environmental program responsibilities for reservations.
- 8. The agency will strive to assure compliance with environmental statutes and regulations on Indian reservations.
- 9. The agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes.

Reservation Trust Lands v. Fee Lands

- Trust lands held in trust by U.S. for benefit of tribe, restraints on alienation, not subject to local taxation
- Fee lands and their history
- Checkerboard pattern within reservations
- Jurisdictional conflicts

New Mexico v. Mescalero Apache Tribe and Montana v. U.S.

- application of New Mexico laws to on-reservation hunting by nontribal members preempted by federally approved tribal ordinances
- "[a] tribe may … retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Brendale v. Confederated Tribes

- The Yakima reservation is typical of many Dawes Act reservations opened to nonmember settlement. When the *Brendale* litigation began, a portion of the reservation had been classified by the Department of the Interior as "open." The open area, with one-half fee and one-half trust lands, had an 80% nonmember population. The "closed area" had no permanent residents and was primarily tribal trust land. The case arose when the Yakima Nation challenged county land-use regulation in both areas of the reservation.
- Justice White, joined by Justices Rehnquist, Kennedy, and Scalia, wrote the opinion concerning the open area. Articulating the internal view of tribal governments, Justice White held that tribes cannot exercise power beyond that necessary to protect tribal self-government or to control internal relations of the tribe. According to these four Justices, tribes have no regulatory authority over nonmembers landowners anywhere on a reservation, even closed areas, absent express congressional delegation. Justices Stevens and O'Connor joined in the White opinion only for the open area of the reservation.
- Justice Blackmun, joined by Justices Marshall and Brennan, wrote a dissent generally supporting tribal territorial jurisdiction over the entire reservation, including the open lands settled by nonmembers. He argued that the internal doctrine would "strip tribes of the power to protect their trust lands over which they enjoy unquestioned and exclusive authority" and concluded that tribal sovereignty is largely determined by geography.Nonetheless, he recognized that discrete areas within a reservation might be exempt from tribal authority: "It may be that on some reservations, including the Yakima reservation, there are essentially self-contained, definable, areas in which non-Indian fee lands so predominate that the tribe has no significant interest in controlling land use."

Bourland and tribal regulation on fee lands

- The Court held that general principles of "inherent sovereignty" do not enable the Tribe to regulate non-Indian hunting and fishing in the taken area.
- Although Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.
- The Court concluded that Congress clearly abrogated the Tribe's preexisting regulatory control over non-Indian hunting and fishing and no evidence in the relevant treaties or statutes exists that Congress intended to allow the Tribe to assert regulatory jurisdiction over these lands under inherent sovereignty.
- The Court, however, left for remand the issue of whether any exceptions to the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the Tribe apply in this case.

Other important decisions

- Strate v. A-1 Contractors
- Yankton Sioux
- Nevada v. Hicks
- Hagen v. Utah
- Duro v. Reina
- Seminole Tribe v. Florida

TAS status overview

- Applicable to some of the major statutes with RCRA a notable exception
- Must be federally recognized
- Exercise substantial governmental powers
- Been delegated jurisdiction over area in question
- Must be reasonable expectation that tribe will be able to conduct program

Important points

- No EPA general grants of primacy to states over fee lands within external boundaries of reservations
- Tribes are subject to regulation and enforcement under federal law, regardless of TAS status
- Compare tribes to federal facilities/CWA example
  - Feds, subject to state regs and enforcement, citizen suits, but not state or c.s. civil penalties
  - Tribes, hardly ever subject to state regs and enforcement, but are subject to citizen suits and potential civil penalties

TAS Status under the CWA

- Section 518 added in 1987
- Provides that EPA may treat tribe as state for
    - Sewage treatment provisions
    - Setting of water quality standards
    - State water quality certifications
    - NPDES and Section 404 permitting
    - Enforcement
    - Waters regulated must be held by tribe, held by U.S. in trust, held by member of tribe if property subject to restriction on alienation, or otherwise within borders of reservation

CWA TAS

- TAS not delegation of plenary authority to regulate all reservation waters
- But also, does not preclude tribal regulation of non-member or off-reservation activity
- Case-by-case approach—tribe must show has inherent authority, using Montana test (“health and welfare”)
- So to regulate non-Indians on fee lands w/in res, must show affect on health and welfare of tribe
- A downstream tribe’s water quality standards can have an indirect regulatory effect on upstream dischargers even if tribe does not directly regulate

Albuquerque v. Browner

- The court upheld EPA's interpretation of § 518 as allowing tribes to establish water-quality standards that are more stringent than those imposed by the federal government.
- Congress' intent on the issue is ambiguous; however, EPA's interpretation is permissible because it is in accord with powers inherent in tribal sovereignty.
- Under §§ 301, 401, 402, and 518, EPA has the authority to require upstream NPDES dischargers, such as Albuquerque, to comply with downstream tribal standards.
- Under the statutory and regulatory scheme, tribes are not applying or enforcing their water-quality standards beyond reservation boundaries, which the city alleges § 518 does not permit.

Montana v. EPA re CWA TAS

- Affirmed the district court's decision that EPA's regulations pursuant to which the tribes' TAS status authority was granted are valid as reflecting appropriate delineation and application of inherent tribal regulatory authority over nonconsenting nontribal members.
- Although EPA's scope of inherent tribal authority is a question of law for which EPA is not entitled to deference, EPA did not commit any material mistakes of law. Rather, the Agency took a cautious view by incorporating both Justice White's and Justice Stevens' admonitions in *Brendale* that, to support the exercise of inherent authority, the potential impact of regulated activities must be serious and substantial.
- EPA's decision found that the activities of the non-members posed such serious and substantial threats to tribal health and welfare that tribal regulation was essential.

Wisconsin v. EPA

- Seventh Circuit affirmed the lower court's upholding of EPA's decision that the Sokoagon Chippewa tribe qualified under § 303 for TAS status. This status gave the tribe the authority to establish water quality standards for off-reservation waters flowing through the reservation into a lake on the reservation. In accordance with EPA regulations, the court held that the tribe had demonstrated that it had authority over the reservation and that off-site waters were essential to its survival.
- The court rejected Wisconsin's argument that the tribe did not have inherent authority to regulate water quality within the borders of its reservation when a state owned the land underlying the affected water. The court determined that because EPA could have set the standards, it was within its discretion to delegate this responsibility to the tribe.

TAS Status under the CAA

- Major difference is potentially broader scope of tribal authority
- 1990 amendments make express delegation to tribes to regulate within exterior boundaries of reservation, regardless of land status
- EPA makes case by case determination about nontrust lands outside of reservation, using Indian country determination and Montana test

Arizona Public Service

- The court held that EPA's regulations implementing CAA amendments properly delegated to tribes authority to regulate air quality on all land within reservations, including fee land held by private landowners who are not tribe members.
- The court first held that EPA correctly interpreted the CAA amendments to constitute an express delegation of authority to tribes to regulate privately owned fee land located within a reservation.
- The CAA § 301(d)(2)(B) makes a clear distinction between areas within the exterior boundaries of the reservation and other areas within the tribe's jurisdiction. This distinction carries with it the implication that Congress considered areas within the exterior boundaries of a tribe's reservation to be per se within the tribe's jurisdiction. Further, accepting the challengers' interpretation of the CAA amendments would result in a checkerboard pattern of regulation within a reservation's boundaries that would be inconsistent with the purpose and provisions of the CAA. Moreover, the legislative history of the amendments supports EPA's interpretation.

Arizona Public Service

- The court also held that EPA properly interpreted reservation to include formal reservations, lands held in trust, and pueblos.
- And EPA reasonably interpreted the extent of tribal authority to redesignate geographic areas and propose tribal implementation plans not just within the limits of reservations, but also within allotted lands and dependent communities so long as a tribe demonstrates inherent jurisdiction over nonreservation areas.

Michigan v. EPA

- The court held that EPA exceeded its authority under the CAA when it promulgated a rule allowing it to treat areas where Indian country status is in question as Indian country, and by proposing to make state/tribal jurisdictional determinations on a case-by-case basis rather than through notice-and-comment rulemaking.
- The CAA grants EPA the authority to implement a federal operating permits program if a state or tribe fails to implement an adequate program of its own. Where a valid state program exists, EPA may implement a federal program only for Indian country itself, not for lands the status of which EPA deems in question. Jurisdiction must either lie with the state or with the tribe, and EPA does not have the authority to implement a federal program in the absence of clear state or tribal authority.
- Thus, prior to implementing any federal operating permits program, EPA must determine the scope of state and tribal jurisdiction. In making these jurisdictional determinations, EPA must use notice-and-comment rulemaking.

RCRA

- **The *Backcountry* court vacated EPA's approval of a solid-waste management plan submitted under § 4005 of RCRA by a tribe that sought to develop a 600-acre landfill on its reservation in San Diego County, California.**
- **Applying the *Chevron* doctrine, the court examined whether RCRA authorizes EPA to approve solid-waste permitting plans submitted by Native American tribes.**
- **The court held that § 4005(c) is clear on its face: states are required to submit solid-waste permitting plans to EPA for review and approval.**
- **Native American tribes, however, are defined as municipalities, not states. Further, § 4005(c) says nothing about municipalities submitting their own solid-waste permitting plans to EPA. Thus, the agency's interpretation of § 4005(c) conflicted with the plain language of RCRA's definitional provisions.**
- **Because Native American tribes are explicitly defined as municipalities, and because only states may submit solid-waste management plans for EPA approval, the Agency's position that it may approve plans submitted by Native American tribes was inconsistent with the statute's plain language.**

Yankton Sioux

- Ultimately Sup. Ct. found that because Congress diminished the Yankton Sioux Reservation in the 1894 Act, ceding the unallotted tracts from the reservation, the state has primary jurisdiction over the waste site and other lands ceded under the Act